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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 740

HENRY APPELBAUM, DOING BUSINESS AS PENGUIN FROZEN FOODS,
Petitioner,

vs.

REFRIGERADORA DEL NOROESTE, S. A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Henry Appelbaum, doing business as Penguin Frozen Foods, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on October 30, 1957, petition for rehearing denied on December 3, 1957.

OPINIONS BELOW.

The opinion of the District Court (R. 694-708) is reported at 138 F. Supp. 354. The opinion of the Court of Appeals, printed in the Appendix herein, *infra*, p. 23, is reported at 248 F. 2d 858.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 30, 1957 (Appendix, *infra*, p. 31). Rehearing was denied on December 3, 1957 (Appendix, *infra*, p. 32). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. May a trial court, in ruling upon a motion for directed verdict after a jury has been unable to agree, completely ignore evidence elicited on cross-examination for the stated reason that such evidence "is not substantive evidence"?

2. May a trial court constitutionally deprive the petitioner of his right to trial by jury by resolving issues that depend on the credibility of witnesses and the effect or weight of conflicting evidence?

(a) Could the District Court in ruling upon the motions for directed verdicts, properly ignore admissions elicited from the chief officer of the respondent on cross-examination for the stated reason that he "was entirely confused"?

(b) Could the Court of Appeals similarly ignore the testimony of the respondent's chief officer because an ambiguous letter written by the petitioner might be construed to contradict the officer's testimony, notwithstanding that the direct testimony of the petitioner was consistent with the officer's damaging admissions?

(c) Could the District Court and Court of Appeals properly deprive the petitioner of his right to have a jury determine the good faith of the respondent's purported withdrawal of its anticipatory breach, where the record is replete with evidence of the respondent's bad faith?

3. Did the respondent's apparent impossibility of with-

drawal of its anticipatory breach constitute a total breach of contract not subject to withdrawal?

4. Was the oral contract between the petitioner and the respondent outside the Illinois Statute of Frauds for the reason that it, being concurrent with a written contract terminable upon the act of the legislature of the Republic of Mexico, could possibly be performed within a year?

CONSTITUTIONAL PROVISION INVOLVED.

The Seventh Amendment to the Constitution of the United States provides (U. S. C. A. Const., Amend. 7):

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

STATUTE INVOLVED.

The pertinent provisions of the Illinois Statute of Frauds (Ill. Rev. Stat. 1955, chap. 59, par. 1) are:

> "No action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

STATEMENT.

The plaintiff, Refrigeradora del Noroeste, S. A., a Mexican corporation (hereinafter called "respondent"), brought this action against Henry Appelbaum, doing business as Penguin Frozen Foods (hereinafter called "peti-

tioner"), for sums alleged to be due for frozen shrimp delivered pursuant to a written contract dated October 19, 1950, as extended by a written agreement of July 22, 1952 (R. 3-5). Jurisdiction of the District Court was invoked under 28 U. S. C. 1332 (a) (2); the controversy exceeds the sum of $3000 exclusive of costs and interest and is between a Mexican corporation and a citizen of the State of Illinois (R. 4). Petitioner filed its answer and counterclaims, charging that respondent had breached its written contract with petitioner and had further breached an oral agreement to bread one million pounds of shrimp annually for petitioner (R. 517; 14-17). The issues were tried before a jury (R. 57). At the close of all the evidence the court granted respondent's motion to strike the breaded shrimp counterclaim (R. 392; 400-1; 403). At the same time, the court reserved its rulings upon motions for directed verdicts filed by both respondent and petitioner (R. 675; 666-7; 677-8). The jury was unable to reach a verdict (R. 688). Thereafter, the court granted respondent's motions for directed verdicts on the complaint and counterclaim and denied petitioner's motions (R. 707). The court, accordingly, entered judgment against petitioner for $210,878.29 plus interest in the amount of $18,215.09 (R. 708). The Court of Appeals affirmed that money judgment; that Court did, however, reverse the District Court's earlier order denying petitioner the right to file an amended answer and counterclaim based upon alleged violations of the Clayton and Sherman Antitrust Acts, and did direct the District Court to determine the antitrust issues (Appendix, *infra*, p. 30).

Respondent is a Mexican corporation engaged in the business of purchasing, freezing, packing, and distributing shrimp (R. 97-8). Petitioner is an Illinois resident engaged in the frozen foods business (R. 205). On October 19, 1950, respondent and petitioner executed a written

contract pursuant to which respondent was obligated to deliver to petitioner for sale by petitioner all of its production of shrimp through August 15, 1951, with the exception of shrimp sold for consumption in Mexico, provided that such domestic consumption was not to exceed 10% of the total production unless the laws of Mexico required otherwise. Petitioner agreed to distribute no Mexican shrimp other than respondent's shrimp and agreed to and did lend respondent $68,000. Petitioner further agreed to establish a letter of credit simultaneously with notification by respondent that it was prepared to ship a carload of shrimp. Each letter of credit was to cover 75% of the market value of the carload of shrimp delivered. Petitioner agreed to remit to respondent 93% of the price at which the shrimp was sold by petitioner, after deducting expenses paid or incurred by petitioner in connection with the transportation of shrimp from respondent to petitioner. Petitioner also agreed to remit any balances disclosed by monthly reports to be furnished to respondent. This contract was to expire on August 15, 1951; the contract was, however, subject to automatic renewal on a year to year basis (from August 16 of one year to August 15 of the next year) unless either party gave notice by March 1 to the contrary (Pltf. Ex. 1; R. 500-9).

On July 22, 1952, the parties executed an agreement extending the relationship for a two year term—that is, to August 15, 1954. This agreement modified the October 19, 1950 contract in that respondent was given the option of determining the method of financing. If petitioner furnished letters of credit, petitioner would continue to remit 93% of the price at which he sold the shrimp. If, however, respondent financed the transaction, petitioner was to remit 95% of the sales price. The extension agreement provided that, with these modifications, the terms of the prior contract would continue in effect (Pltf. Ex. 3; R. 511).

On February 25, 1953, respondent sent petitioner a telegram notifying petitioner that it was respondent's will to terminate its contract with petitioner as of August 15, 1953 (Pltf. Ex. 4; R. 512). The next day, February 26, 1953, petitioner wired respondent that the contract was not subject to cancellation until 1954 (Pltf. Ex. 5; R. 512). On March 5, 1953, respondent replied: "Replying your February 26 insist our notice cancellation contract if wish discuss point suggest you come Mexico City" (Def. Ex. 34; R. 556). Petitioner on March 6, 1953, wrote respondent a letter requesting an explanation of respondent's attempt to cancel and concluding: "I am sure that if there are any differences in the contract the Board of Directors wishes to discuss, we can reach an agreement without threats of cancellation" (Def. Ex. 5; R. 542-3). On March 12, 1956, respondent replied: "My personal interpretation on the letters and telegrams advising of the cancelling of the contract with Reno have no more object than to leave the new directors of Nacional Financiera in absolute liberty for the contracting for the distribution of shrimp by Reno, and not to give the impression it has formed an irrevocable contract for a long period." (Def. Ex. 5-A; R. 544).

Upon the giving of the cancellation notice, respondent through its general manager, Pedro Pinson, in March, 1953, began negotiations for the formation of a new plan of distribution for its shrimp (R. 212-3). Respondent was instrumental in forming a new Mexican organization called Exportadores Associados (hereinafter called "E.A."), the stock of which was owned by the shrimp producers of the West Coast of Mexico, including respondent (R. 119). The new plan further contemplated that the participating producers would contract to sell their entire production to E.A. and that E.A. in turn would cause an American corporation to be formed to distribute the shrimp in the United States

(R. 120-1, 214-5, 220, 226). The American corporation, Crest Importing Company (hereinafter called "Crest") was formed in June, 1953 and was owned entirely by E.A. (R. 211). E.A. would, of course, contract with Crest to sell its entire supply of shrimp to Crest (R. 121, 214, 220; Def. Ex. 8; R. 546-7).

As early as April, 1953, petitioner heard rumors concerning the new plan of distribution (R. 271). In June, 1953, petitioner sent Robert Appelbaum to Mexico. Robert Appelbaum was unable to dissuade respondent from its determination to cancel (R. 327-330). In July, 1953, Henry Appelbaum himself went to Mexico, where Pedro Pinson fully explained the new plan of distribution and handed to Appelbaum a letter suggesting the possibility of petitioner's handling of a territory under the "new organization to which we now belong" (R. 242; Pltf. Ex. 6, R. 513).

On August 24, 1953, respondent sent to petitioner a telegram stating that: "* * * There is no violation of our contract which was legally cancelled * * *" (Pltf. Ex. 9, R. 515). Petitioner answered by wire dated August 25, 1953, saying: "* * * our contract is in full force and effect until August 15, 1954. Again urge that you send authorized representative as you have often promised to do so that we can negotiate amicable settlement" (Pltf. Ex. 10; R. 516).

On September 24, 1953, the parties held two conferences at Chicago, Illinois. Present at these meetings were Henry Appelbaum, his son Robert, petitioner's attorney Stanford Clinton, John Willis, President of Crest, Oscar Fraustro, Chairman of respondent's Board of Directors and General Comptroller of Nacional Financiera, and Monroe Collenburg, New York attorney representing Nacional Financiera. Nacional Financiera is an agency of the Mexican government which is similar to the Reconstruction Finance Corporation and owned 75% of respondent's capital stock (R.

191, 161-2). At these conferences petitioner was offered a sub-brokerage under Crest or, in the alternative, settlement payments of $40,000. Petitioner rejected all of these overtures (R. 192-5, 199-200). Mr. Collenburg testified that at the end of the second conference, he asked Henry Appelbaum whether it was Appelbaum's position that he wanted respondent to perform the balance of its contract with him. Collenburg testified that Appelbaum replied "Yes that is it exactly" (R. 195). Appelbaum testified that he rejected offers of $25,000 and $40,000 and that at the end of the meeting Collenburg stated, "Well then, there is nothing left for us to do. Then I suppose we will have to go through with the contract." Appelbaum replied "That is all right with me, if I get assurance that they are going through with the contract" (R. 264-5). In that meeting the parties discussed the question of a guarantee of performance. Oscar Fraustro testified that he could not make such guarantee (R. 185).

On October 3, 1953, respondent wired petitioner that it "confirmed the extension letter July, 1952. Stop. Therefore contract remains in full force and vigor and directors hereby request payment to Bank America on or before Wednesday October 7, 1953 of all sums due as result your sales to date or shipments. Stop. Anticipate shipping first car around October 9th thus simultaneously payment Bank America open letter credit to cover this first shipment • • •" (Pltf. Ex. 12; R. 517). The payment requested related to shipments of cars 31 through 38 during the period October, 1952 to June, 1953. It is for the payment of these cars that respondent filed its action (Pltf. Ex. 17; R. 520).

On October 6, 1953 petitioner replied by telegram stating that "• • • inasmuch as you specify use of letters of credit assume you are returning to 7% commission arrangements. All this quite agreeable however in light of my recent experiences I am entitled to adequate security for

your performance. Puzzled by your direction of only one letter of credit when heretofore you have requested five or more at the opening of season. Nevertheless letter credit opened Banco Occidental at the following prices • • •" (Pltf. Ex. 13; R. 518).

On October 7, 1953, respondent wired petitioner as follows: "Commercial relations renewed under original contract and extension, your cable omits confirmation that required payment according to our previous cable has been made. We categorically demand it" (Pltf. Ex. 14; R. 518). On October 8, 1953, petitioner replied "We will continue to remit for cars as completely sold out in accordance with past practice so long as you live up to your agreement" (Pltf. Ex. 15; R. 519). On October 20, 1953, petitioner sent respondent a telegram stating that petitioner's failure to comply with respondent's wire of October 3rd was a most serious breach of contract, that respondent refused to send petitioner any more shrimp and that respondent demanded payment of any amounts due it (Pltf. Ex. 16; R. 519). The correspondence between the parties ended with petitioner's telegram of October 21, 1953. In that telegram petitioner stated "• • • your wire October 20 received. Not at all surprised as placed no reliance whatever in your promises to ship. Your entire conduct since February 25, 1953 proves conclusively that your continuous objective has been to evade the obligations of our contract. Our counsel advises us that we are now entitled to bring suit against you" Def. Ex. 3; R. 542).

Petitioner further adduced testimony and documentary proof to show the existence of an oral agreement entered into between respondent and petitioner in July, 1952. Under this agreement, which was to exist during the written agreements of October 19, 1950 and July 22, 1952 (Pltf. Ex. 1, 2; R. 500-509, 510), respondent was to bread one million pounds of shrimp per year and was to be paid its

cost plus four cents per pound profit. Although, pursuan to that agreement, petitioner sent the respondent a devein ing machine, as well as other supplies and equipment, re spondent did not ship any breaded shrimp to petitione (R. 278-300; Pltf. Ex. 51-71, 73-75; R. 633-657). At th end of petitioner's case, the trial court granted respondent' motion to strike the counterclaim based on this agreemen and to strike all portions of the testimony and all exhibit pertaining thereto (R. 400-1; 403).

REASONS FOR GRANTING THE WRIT.

1. The affirmance of the money judgment places the imprimatur of the Court of Appeals upon the following misstatement of evidentiary law by the District Court, now published at 138 F. Supp. 354 (R. 694 at 703):

> "* * * if it was counsel for the defendant's intention to prove a practice of making payment then it was incumbent on the defendant to prove this by direct testimony in his case in chief and not by admissions on cross-examination during the plaintiff's case. *Evidence elicited on cross-examination is not substantive evidence and cannot be used to prove an issue which must be proved with direct testimony by the party asserting it.*" (Emphasis added.)

The testimony referred to by the District Court was that elicited upon cross-examination of Pedro Pinson, who was a director and the general manager of respondent at the time of the occurrence of all matters pertinent to this case (R. 97-8, 112-14, 177-8). Pinson testified on cross-examination that after the extension agreement of July 22, 1952, the oral understanding of the parties was that petitioner was to remit to respondent for each carload of shrimp after it had been completely sold out (R. 118, 139, 147-8). On October 3, 1953, the date upon which respondent sent a telegram requesting petitioner to pay all sums due, the cars which were the subject of respondent's collection were not completely sold out and, therefore, payment for them was not yet due (R. 266-7; Def. Exs. 46, 47, 48, 49, 58; R. 562, 565, 568, 570, 572). Moreover, an oral agreement as to payment under the extension agreement was entirely in order because the original contract contained provisions only as to a letter-of-credit method of financing; the original contract contained no provisions as to payment

where respondent rather than petitioner financed the sales, and respondent financed the cars in question (R. 117-18; 141-3; Pltf. Ex. 1, R. 500-9; Pltf. Ex. 3, R. 511). Henry Appelbaum's testimony confirmed the oral agreement as to payment when the cars were sold out (R. 118, 139, 147-8, 234-5, 258).

There is no authority anywhere for the above-quoted statement of the District Court. The only rule of evidence which is even remotely similar to the court's statement is the rule that when a so-called "turncoat witness" changes his story, his prior inconsistent statements, while admissible for impeachment purposes, do not constitute substantive evidence of the facts contained in such previous statements, for the reason that the previous statements were not made under oath and were not subject to immediate cross-examination. 3 Wigmore, Evidence, § 1018; Annotation, 133 A. L. R. 1454; McCormick, The Turncoat Witness, 25 Tex. L. Rev. 573 (1947). However, in the present case the above rule has no application whatsoever. Pedro Pinson was not called as an adverse witness or otherwise by petitioner, but was called as a witness on behalf of respondent. For this reason alone the "turncoat witness" rule does not apply. Furthermore, Pinson testified as a representative and agent of respondent and his admissions were the admissions of respondent. Finally, the testimony referred to by the District Court did not consist of previous statements not under oath and not subject to further examination but was the actual testimony *under oath* by Pinson and subject to immediate further examination by respondent's counsel.

Not only is the testimony of a party or the party's representative elicited upon cross-examination admissible as substantive evidence against the party, but many courts and authorities heve held and stated that *such testimony absolutely binds the party giving such testimony.* Thus, according to some authority, Pinson's testimony would re-

quire that a directed verdict be entered on behalf of petitioner in this case. 9 Wigmore, Evidence § 2594 (a); Annotations 50 A. L. R. 979, 80 A. L. R. 624, 169 A. L. R. 798; McCormick, Handbook of the Law of Evidence, § 243, page 513 ff. But even assuming that Pinson's testimony was not binding upon respondent to the extent that it required the District Court to direct a verdict for petitioner, nevertheless under any view of this type of testimony, it constitutes substantive evidence which petitioner in this case was entitled to have presented to the jury for its determination.

In a case where the trial court directed a verdict for the plaintiff, as in the present case, *Bay Island Drainage District* v. *Nussbaum*, 388 Ill. 124 (1944), the Supreme Court of Illinois, in reversing and remanding, said at page 134:

> "First and principal of the questions raised is whether the court erred in directing a verdict for the plaintiff. In determining this question it is unnecessary to go at length into the evidence in the record, since such an issue depends upon whether the defendant presented any evidence which, when viewed in its aspect most favorable to the defendant can be said to have constituted evidence tending to support its claim that the proportion which plaintiff claims defendant should pay is too high. On a motion to direct a verdict, the unimpeached evidence of the party against whom the motion is directed must be accepted as true, and the most favorable interpretation and inference such evidence will bear must be given it, and, if there is any evidence tending to support the claim of the party against whom the motion is made, it is error to direct a verdict. (Citations). In considering a motion for a directed verdict courts cannot weigh the evidence but are required to resolve all controverted questions of fact in favor of the parties opposing the motion. (Citations). *In determining whether the court erred in directing a verdict, it is immaterial upon which side the evidence is introduced. If evidence introduced*

by either side, with its legitimate and natural inferences tends to establish the claim of the party opposing the motion, the motion should not be allowed." (Emphasis added.)

2. The District Court, in granting respondent's motions for directed verdicts and denying petitioner's motions after the jury was unable to agree, necessarily violated petitioner's constitutional right to have substantial fact issues tried by a jury (U. S. C. A. Const. Amend. 7); and the affirmance by the Court of Appeals can be justified only by completely disregarding pronouncements of the Supreme Court of the United States. In *Gunning* v. *Cooley*, 281 U. S. 90, 94 (1934) this Court said:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that are fairly deducible from them."

To direct a verdict for a party in a case where there is conflicting evidence is to deprive the opposing party of his right to a trial by jury. In *Tennant* v. *Peoria and Pekin Union Railway Co.*, 321 U. S. 29, 35-6 (1944), the Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility

> of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In reaching its decision the District Court necessarily drew factual inferences unfavorable to petitioner, weighed the evidence and determined the preponderance of the evidence. The District Court further invaded the province of the jury by indulging in determinations respecting the credibility of witnesses. Several of the more salient examples of how the District Court judgment and opinion of the Court of Appeals have deprived petitioner of the constitutional right to a trial by jury shall be considered briefly:

(a.) The District Court avoided the testimony elicited on cross-examination of Pedro Pinson upon the alternative basis that Pinson "was entirely confused" (R. 703) and did not mean what he said. Thus, the District Court weighed qualitatively Pinson's testimony, which rightly should have been left to the jury. The Court of Appeals did not comment upon the misstatement of evidentiary law and disposed of Pinson's testimony by observing that "defendant's letter of July 22, 1952, referring to the extension agreement clearly demonstrates that no such practice existed" (Appendix, *infra*, p. 28). The document dated July 22, 1952, does not refer to the extension agreement but it is the extension agreement and it is not "defendant's letter" but "plaintiff's letter". Perhaps the Court of Appeals intended to refer to Penguin's letter of August 6, 1953 (R. 524 at 528). That letter is, at least, ambiguous; and the Court of Appeals has ignored the

testimony of Pedro Pinson, respondent's chief executive officer, to the contrary (R. 118; 139; 147-8) and the testimony of Henry Appelbaum (R. 234-5; 258), all of which proved that the practice of paying for cars only when sold out did exist. Under what possible theory can petitioner be deprived of a jury determination of this factual issue?

(b.) Both the District Court and the Court of Appeals held that respondent's telegram of February 25, 1953, constituted an anticipatory breach of contract but that respondent's telegram of October 3, 1953, was an effective withdrawal of that anticipatory breach (Appendix, *infra*, p. 28; R. 701). In concluding that the anticipatory breach was effectively withdrawn, both courts below ignored completely the primary fact upon which petitioner was entitled to a jury determination—whether respondent's action in "withdrawing" the breach was made in good faith.

The record is replete with evidence from which a jury could determine that respondent acted in bad faith. Respondent's general manager, Pedro Pinson, was one of the founders of the Crest E. A. plan of distribution (R. 128-9; 153; 212; 230). Pinson objected to the contracts between respondent and petitioner and urged the board of directors of respondent to terminate those contracts (R. 128-9). At about this time National Financiera, which owned 75% of the stock of respondent and was a large creditor and had the right to name two of its officers to the five-member board of directors of respondent, experienced a change in administration. (Def. Ex. 72; R. 591; R. 161-3, 248, 290). With this background the cancellation telegram was sent (Pltf. Ex. 4, R. 512). Petitioner resisted the attempted cancellation (Pltf. Ex. 5, R. 512).

Pinson then approached Willis with a definite plan for a new method of distribution of shrimp (R. 228, 231). The

plan was that respondent and other West Coast of Mexico shrimp producers would form a Mexican corporation known as Exportadores Associados (hereinafter called "E.A."), the stock in which would be owned by the producers (R. 119, 121-2, 150, 215). The participating producers would contract with E.A. to sell their entire production to E.A. (R. 120-1, 214-5, 220, 226). An American corporation, later known as Crest Importing Company, Inc. (hereinafter called "Crest") would also be formed, the entire capital stock in which would be owned by E.A. (R. 121; Def. Ex. 19; R. 555). E.A. would contract with Crest to sell its entire supply of shrimp to Crest (R. 121, 214, 220; Def. Ex. 8; R. 546-7). Negotiations between Pinson and Willis leading toward the information of E.A. and Crest began in March, 1953 (R. 212-3), shortly after the February 25, 1953 notice of cancellation to petitioner (Pltf. Ex. 4; R. 512).

Willis met Pinson in Mexico City in March, 1953 (R. 212-3) and Pinson asked him to take the job of forming and operating the E.A.-Crest method of distribution (R. 228, 231), which Willis accepted (R. 231-2). In July, 1953, contracts in the Spanish or Mexican language were prepared whereby respondent among other producers, bound itself to deliver its entire production for the 1953-4 season to E.A. for eventual disposition by Crest (R. 151-2, 214-5, 548). Respondent began to make preparations to sell its production to E.A. and then to Crest (R. 125).

Pinson and Willis were the leading figures in the formation of the E. A.—Crest was formed as a California corporation in June, 1953 with Willis as president and Pinson as a director and vice-president (R. 98, 121, 211-3, 213). Pinson at that time was also a director of E.A., having been a director since the formation of E.A. (R. 98, 121). Respondent owned 8 to 9% of the capital stock of E.A. (R. 122, 150), which in turn owned all of the capital stock

of Crest (Def. Ex. 19; R. 555). On August 3, 1953, Pinson was elected Chairman of the board of directors of Crest (R. 217). Crest and petitioner were, of course, competitors (R. 123-4).

In April, 1953 petitioner learned about the Crest-E.A. plan (R. 271). In June, 1953 Robert Appelbaum was told by Francisco Alcade, the chairman of the board of directors of respondent, that "in Mexico a contract doesn't mean anything"; that petitioner couldn't do anything about the wrongful cancellation of the contract; and that Pinson was undermining petitioner with respondent's board of directors (R. 327; 329). In July, 1953, Henry Appelbaum was told by the chairman of respondent's board of directors and by one of the directors that Reno was "*absolutely* committed to the (E.A.-Crest) deal and there is nothing anybody could do to change it" and that there was nothing anyone could do about it (R. 247-8).

On August 15, 1953, Crest opened up for business (R. 221). Meanwhile, Pinson had been promoted to chairman of the board of directors of Crest, but had remained as general manager of respondent (R. 217). From August 5 to 7, Pinson, Willis, and the chairman of respondent's board met with Bank of America officials to establish the financing of Crest (R. 228; Def. Exs. 78, 80, 82, 83; R. 598, 603, 604, 606).

On October 3, 1953, seven full weeks after the actual breach of contract and after almost seven and one-half months of insisting upon cancellation, respondent tersely advised petitioner, without any preliminary discussions, that it had *ex parte* decided that the "contract remains in full force and vigor and directors hereby request payment" on or before October 7, 1953, four days later (Pltf. Ex. 12; R. 517). It is important to note several circumstances which existed on October 3, 1953:

(1) Pinson, although still the general manager of

respondent (R. 150), remained, on and after October 3, 1953, a director of E.A. (R. 150) and a director and, in fact, chairman of the board of directors of Crest (R. 150, 217), petitioner's competitor (R. 123-4). On and after October 3, respondent itself remained a shareholder of E.A. and had not sold nor disposed of its shares in E.A. (R. 150), which, in turn, owned all of the stock in Crest (Def. Ex. 19; R. 555), petitioner's competitor.

(2) Respondent never had an office or agent in the United States available for service of process in the event it become necessary for petitioner to sue the respondent for damages for breach of contract (R. 149).

(3) *The contract* between E.A. and Crest, which had been written in Spanish or Mexican in July, 1953 and which had committed respondent to deliver its entire production to E.A. for eventual delivery to Crest (R. 214-5, 548) *was written in English on or about November 23, 1954, more than one year after the present controversy developed and was dated back to October 5, 1953 to coincide conveniently with the October 3, 1953 date which had become important to Pinson in his dual role as chief officer of both respondent and Crest and both of whose boards of directors he obviously controlled (Def. Ex. 8; R. 546; R. 214, 219).* The English version did not include respondent as a party to the contract.

Under the circumstances, respondent's sudden, terse and unexplained message to the effect—"We have changed our mind; send money" could mean but one thing: "Send the money and that's the last you will ever see of us; you can sue us in Mexico to get the money back if you think you're entitled to it." This is the only possible conclusion at which petitioner or any juror or any reasonable man could arrive. If there could possibly be a scintilla of doubt as to respondent's bad faith, it was certainly dispelled by what occurred after October 3, 1953. Notwithstanding that petitioner opened two letters of credit totaling $60,000,

which exceeded the value of the car promised, respondent did not ship the car (R. 268; Pltf. Ex. 13, R. 518). In short, respondent never performed after October 3, 1953.

On October 21, 1953, respondent wired petitioner that "your failure to • • • pay • • • is most serious breach of contract on your part and we refuse to send you any more shrimp for resale • • •" (Pltf. Ex. 16; R. 519). *On the day before—October 20, 1953—respondent had already started to deliver shrimp to Crest as Penguin, or as any juror or as any reasonable man possessed of the facts which Penguin had, could have readily predicted would happen even if Penguin had sent some money (which was never owing) in accordance with the demand of October 3, 1953* (R. 154, 226-7).

Thus in order for the trial court to direct a verdict for respondent it was necessary for the court to determine the fact question that respondent was acting in good faith when it purported to "withdraw" its breach of contract. In order to find that respondent acted in good faith, *it was necessary for the court to draw all inferences against petitioner, to weigh the evidence and to determine its preponderance*, contrary to every principle of directing verdicts.

Since petitioner's defense to, and recoupment and set-off against, the complaint is based upon the same facts and theory as those relating to the counterclaim, everything said in this analysis of the record as it relates to the counterclaim also relates to the defense. Therefore the jury could, after considering those facts, have found for petitioner on the counterclaim and also for petitioner as to its defense to the complaint.

3. The Court of Appeals reached erroneous legal conclusions without discussion or citation of authority:

(a) The Court said (Appendix, *infra*, p. 28) that "the

record is devoid of evidence to prove Reno became bound by written contract or otherwise to sell its product to either E.A. or Crest." This statement by implication overrules a rule of law the existence of which no one seems heretofore to have denied and which is set forth in 1 Restatement of the Law of Contracts § 318, p. 475, to the effect that *apparent* impossibility constitutes a total breach of contract.

The evidence shows as strongly as one could expect to elicit evidence from adverse witnesses on cross-examination that respondent was a party to the Spanish contract, obligating respondent to deliver its complete production to E.A.-Crest, which made performance of respondent's contract with petitioner *actually* impossible and it cannot be presumed that petitioner was clairvoyant enough on October 3, 1953 or at any time prior thereto to know that in November, 1954, over a year later, a new written contract would be drawn, dated back to October 5, 1953, eliminating respondent as a party. Further evidence of the apparent impossibility is Pinson's own statement that in July, 1953, he "fully explained to Mr. Appelbaum the formation of E.A. and Crest" (R. 130) and Reno's letter dated July 17, 1953 (Pltf. Ex. 6, R. 513-4) which says in part:

> "• • • the new organization • • • will handle our production• • •." "• • • the new organization to which we now belong, the President of same Mr. John W. Willis • • •."

(b) In connection with the "breaded shrimp counterclaim" the court (Appendix, *infra*, p. 29) overrules without discussion or authority the rule of law set forth in 2 Williston on Contracts (Rev. Ed.) § 495, pp. 1441-2, 1444-5, to the effect that an oral contract is not subject to the statute of frauds if there is a *possibility* of performance within a year.

The undisputed evidence was that the oral bread contract was to run concurrently with the written contracts of October 19, 1950, and July 22, 1952 (R. 16, 30, Pltf. Exs. 1, 3; R. 500, 511). The written contracts provided that respondent would not be obligated to perform if the laws of Mexico prohibited the exportation of frozen shrimp (R. 500-1). Since there was a possibility that the written contracts could be terminated within a year by legislation in Mexico, it follows that performance under the oral contract could be completed within a year.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANFORD CLINTON,
ROBERT A. SPRECHER,
FRANK A. KARABA,
Counsel for Petitioner.

January 22, 1958.

APPENDIX.

1. Opinion of Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11717 SEPTEMBER TERM AND SESSION, 1957

REFRIGERADORA DEL NOROESTE S.A., *Plaintiff-Appellee*, *vs.* HENRY APPLEBAUM, Doing Business as Penguin Frozen Foods, *Defendant-Appellant*. } Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 30, 1957

Before DUFFY, *Chief Judge*, and MAJOR and LINDLEY, *Circuit Judges*.

DUFFY, *Chief Judge*. Plaintiff will hereinafter sometimes be referred to by its trade name "Reno." Plaintiff brought this suit against defendant for sums alleged to be due under a contract for the sale of shrimp. Defendant answered and interposed several counterclaims. A jury was unable to agree upon a verdict. The trial court then granted plaintiff's previously made motion for a directed verdict; denied the motions made by defendant and entered judgment against defendant for approximately $210,000 plus interest.

Reno is a Mexican corporation engaged in the business of purchasing, freezing, packaging and distributing shrimp. Reno produced about one-eighth of the total production of West Coast of Mexico shrimp. Defendant is a resident of Illinois engaged in the frozen food business. He distributes shrimp throughout the United States and Canada.

On October 19, 1950, plaintiff and defendant executed a written contract under which plaintiff was obligated to deliver to defendant for sale, all of plaintiff's production of shrimp through August 15, 1951 with the exception of shrimp sold for consumption in Mexico.[1] Defendant agreed that he would not distribute Mexican shrimp other than that received from plaintiff and agreed to and did lend $68,000 to plaintiff. Defendant also agreed to establish a letter of credit simultaneously with notification by plaintiff that it was prepared and ready to ship a carload of shrimp. Each letter of credit was to cover 75% of the market value of the carload of shrimp delivered.

Under the contract defendant was to remit to plaintiff 93% of the price for which defendant had sold the shrimp after deducting all expenses paid or incurred by defendant in connection with the transportation of the shrimp. The contract also provided that on or before the 15th of each month, defendant was to deliver to Reno a report with specified information as to shrimp sold. Defendant agreed that simultaneously with the delivery of such report it would pay to plaintiff the balance due on all sales made by defendant "as disclosed by such report."

Under Clause 18 the contract would expire on August 15, 1951, and on August 15 of each succeeding year thereafter if the contract were renewed. Under this same clause the contract was to be automatically renewed for another

1. There were other conditions not material here giving effect to possible requirements under Mexican law.

year unless either party notified the other to the contrary by March 1st of each year.

On July 22, 1952, the parties executed an extension agreement which modified the terms of the original agreement. By this modification the term of the contract was extended for two years and the plaintiff was given the option whether or not defendant was to furnish letters of credit. If defendant did furnish letters of credit defendant would continue to remit 93% of the sale price of the shrimp, otherwise defendant was to remit 95%.

On February 25, 1953, Reno sent defendant a telegram stating it was Reno's will to terminate the contract and stating the contract by its terms would thus end on August 15, 1953. Defendant promptly wired Reno that the contract was not subject to cancellation until 1954. Then followed an exchange of letters and telegrams in which Reno insisted the contract was canceled and defendant insisted that the contract remained in full force and effect until August 15, 1954.

Upon giving the cancellation notice, Reno, through its General Manager, Pedro Pinson, began negotiations for the formation of a new plan of distribution of its shrimp. Reno was instrumental in forming a Mexican organization called Exportadores Associados (hereinafter called E.A.) which consisted of five West Coast of Mexico shrimp producers whose combined production amounted to approximately one-fourth of the total production of West Coast of Mexico shrimp. These producers, including Reno, were stockholders in E.A. In June, 1953, an American corporation called Crest Importing Company, with headquarters at San Diego, California, was formed. This corporation was owned entirely by E.A.

A contract was executed on October 3, 1953 between E.A. and Crest whereby E.A. was to sell and Crest was to pur-

chase all of E.A.'s production of shrimp. All of the stockholders of E.A. except Reno had previously agreed to sell their entire production to E.A.

On September 24, 1953, upon demand of the defendant, conferences were held in Chicago in an endeavor to reach an amicable settlement. Among those attending were defendant, his son and attorney; John Willis, President of Crest, and Oscar Fra istro, chairman of Reno's board of directors, and general comptroller of Nacional Financiers which is an agency of the Mexican government and owned 75% of Reno's stock. Reno offered defendant a subbrokerage under Crest, and in the alternative offered to make settlement payments of $40,000. Defendant refused these offers and made counter offers which were rejected by Reno.

On October 3, 1953, Reno sent a telegram to defendant admitting the contract was in full force and effect. Reno demanded payment on or before October 7, 1953 of all sums due as a result of previous shipments of shrimp. The payment requested related to the shipment of cars 31 through 38 during the period from October, 1952 to June, 1953. The telegram also stated that plaintiff anticipated shipping the first car of shrimp about October 9th and instructed defendant to open a letter of credit to cover same. In a covering letter Reno stated any further delay in making payment might result in Reno's financial failure.

Defendant replied by telegram dated Octobe 6, 1953, wherein defendant stated that in the light of his recent experience with plaintiff he was entitled to adequate security for plaintiff's performance. Defendant also stated he was puzzled at plaintiff's direction to open only one letter of credit when plaintiff had previously requested five or more at the opening of the season.

By telegram dated October 8, 1953, defendant stated he would continue to remit for cars as they were "completely sold out in accordance with past practice so long as" plaintiff lived up to the agreement. On October 20, 1953, plaintiff telegraphed that it considered defendant's failure to make payment as requested in plaintiff's telegram of October 3 to be a most serious breach of contract. Plaintiff further stated that because of defendant's breach it refused to ship him any more shrimp. Defendant then was instructed to make payment as directed to the First National Bank of Chicago and to deposit with that bank all warehouse receipts covering plaintiff's shrimp that defendant had not sold. Thereafter, this suit was filed seeking payment for cars 31 through 38 which were shipped to defendant during the 1952-1953 season. Defendant filed an amended counterclaim alleging that plaintiff had breached the contract as a result of which defendant suffered damages well in excess of the amount of plaintiff's claim.

On November 10, 1954, defendant filed a counter-claim alleging the breach by plaintiff of an oral agreement whereby plaintiff agreed to undertake the breading of one million pounds of shrimp yearly. On June 3, 1955, four days before the date set for the commencement of trial, defendant sought to file instanter, an amendment to his amended answer and counterclaim, setting forth a claim based upon alleged violation by plaintiff of the Clayton and Sherman Antitrust Acts. The Court denied leave to file such amendment.

We agree with defendant's contention that the plaintiff's telegram of February 25, 1953 was an anticipatory breach of contract. Plaintiff desired to terminate the contract apparently believing it had the legal right so to do. However, after being advised by American counsel that the contract was in force until August 15, 1954 and could not

be terminated on August 15, 1953, plaintiff promptly notified defendant that the contract was in full force and effect.

The Mexican shrimp season runs from October to July of the following year. At no time had plaintiff shipped shrimp to defendant prior to the month of October. We agree with the trial court that plaintiff's telegram of October 3, 1953 had the effect of restoring the contract to full validity. Plaintiff's anticipatory breach was effectively withdrawn before plaintiff's duty of immediate performance arose.

Defendant argues that plaintiff's notice of intent to perform was ineffective because plaintiff could not then perform due to commitments with E.A. and Crest. Again we agree with the trial court that the record is devoid of evidence to prove Reno became bound by written contract or otherwise to sell its product to either E.A. or Crest.

Defendant next contends he was under no duty to pay plaintiff on October 3, 1953 because, according to a practice followed by the parties, payment for each car of shrimp became due only after that car had been completely sold out. However, defendant's letter of July 22, 1952 referring to the extension agreement, clearly demonstrates no such practice existed. The written contract obligated defendant to pay plaintiff for all shrimp which the monthly report revealed were sold during the preceding month. The trial court was correct in holding that proof had not been made of an agreement to vary that condition of the written contract.

The fact is defendant refused to pay for the shrimp because he was fearful that after Reno received the remittance for the amount past due it would then refuse to make further shipments of shrimp. Defendant was, of course, faced with a very practical problem. He could not obtain service of process on Reno, a Mexican corporation. He desired to withhold funds as a club to compel Reno to continue shipping carloads of shrimp to him. But by thus

refusing to pay for the amounts past due he breached the contract and Reno was legally entitled to terminate the contract and to sue for the balance due.

We hold the District Court was correct in granting plaintiff's motion for a directed verdict which had been taken under advisement pursuant to Rule 50 (b), Federal Rules of Civil Procedure. We agree with the determination of the trial court that as a matter of law defendant's refusal to pay for the shrimp it had received from Reno was a breach of contract entitling plaintiff to bring this suit. The judgment entered for plaintiff in the sum of $210,878.29 was proper.

Defendant asserts error because the court, at the close of defendant's case, struck the so-called "breaded shrimp counterclaim." Defendant alleged an oral agreement whereby Reno agreed to bread shrimp for defendant at four cents a pound. Plaintiff was to furnish all necessary labor and defendant was to furnish all cartons, labels and breading material. Plaintiff alleged the agreement was to continue until the written contracts for unbreaded shrimp had terminated.

The trial court held on the undisputed evidence that as the alleged oral contract was to run concurrently with the written contracts of October 19, 1950 and July 22, 1952, this would be contrary to the Illinois Statute of Frauds (Ill. Rev. Stat. 1955, c. 59, § 1) which provides that "no action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof * * *." We hold the trial court was correct in dismissing this counterclaim.

Defendant further contends the trial court erred in rejecting certain exhibits. We find no reversible error in this respect.

Defendant complains of orders of the trial court as to matters of pretrial discovery. We do not find any prejudice to defendant in these rulings.

On June 3, 1955, defendant sought leave to file instanter an amendment to his amended answer and counterclaim, alleging plaintiff had entered into a combination, conspiracy and monopoly in violation of the Clayton and Sherman Antitrust Acts. The trial of this cause had been theretofore set for June 7, 1955. Clearly the trial court acted within its discretion in not permitting the trial of the main cause to be postponed until after such time as plaintiff had filed its rsponsive pleading. However, it was not necessary that the trial of the main cause be postponed as the court could have permitted the filing of the amendment and ordered a separate trial thereon.

The motion to file was accompanied by an affidavit stating that "within the past few weeks, counsel for defendant learned additional facts which they believe constitute a further cause of action. * * *" Counsel claims to have obtained this information while taking depositions in Mexico. He returned to the United States from that trip on May 24, 1955.

Rule 15(a) Federal Rules of Civil Procedure provides that leave to amend shall be freely given when justice so requires. By refusing to permit the amendment to be filed, defendant was, in fact, denied his day in court. Plaintiff is a Mexican corporation and it seems to be conceded, is not available for process anywhere within the United States. Under the circumstances of this case, we hold the denial of the motion to file this answer and counterclaim, was error. An order should be entered permitting such filing and giving plaintiff an appropriate time to file an answering pleading. The order should then provide for a separate trial upon the issues thus raised. The trial court, in its discretion, could withhold execution on the judgment which we have herein affirmed, until such time as the antitrust issues have been determined.

AFFIRMED in part, REVERSED in part.

2. Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, October 30, 1957.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

REFRIGERADORA DEL NOROESTE S. A., *Plaintiff-Appellee,*

No. 11717 *vs.*

HENRY APPELBAUM, doing business as PENGUIN FROZEN FOODS, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part and REVERSED in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the Opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs in this Court be divided equally between the Plaintiff-Appellee and the Defendant-Appellant.

3. Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Tuesday, December 3, 1957.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

REFRIGERADORA DEL NOROESTE S. A.,
Plaintiff-Appellee,

No. 11717 *vs.*

HENRY APPELBAUM, doing business as PENGUIN FROZEN FOODS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 740

HENRY APPELBAUM, Doing Business as PENGUIN FROZEN FOODS,

Petitioner,

vs.

REFRIGERADORA DEL NOROESTE S. A.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

OPINIONS BELOW, JURISDICTION AND STATUTE INVOLVED.

The opinions below, jurisdictional requisites and statute involved are adequately set forth in the petition.

QUESTIONS PRESENTED.

Stripped of conclusions and argument, the questions raised by the petition are:

1. Whether there was sufficient evidence to go to the jury with respect to the petitioner's contentions that: